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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, appellant, *v.* THE UNITED STATES. } No. 248.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was brought to recover amounts alleged to have been unlawfully deducted, on account of free baggage allowances, from compensation due the Florida Central & Peninsular Railroad Company on certain freight shipments made over its lines by the United States more than four years before the plaintiff corporation was created.

The plaintiff sued as successor to the rights of the Florida Central & Peninsular Railroad Company through a merger or consolidation of that corporation with one of the same name as the plaintiff, less than 10 months prior to the filing of the original petition.

The petition was dismissed on the ground that by this merger or consolidation a voluntary assignment and transfer of the said rights was made to the new

corporation, which assignment was null and void under the provisions of section 3477 of the Revised Statutes, and that therefore no court had jurisdiction to grant the relief prayed for.

The plaintiff appeals from the judgment of dismissal.

During and immediately after the war with Spain, and in the years 1898 and 1899, the Florida Central & Peninsular Railroad Company, a corporation organized and operating under the laws of Florida and Georgia (Finding I. R., p. 4), transported over its lines, either as sole carrier or as final carrier of shipments originating on the lines of the Southern Railway Company, certain freight and baggage accompanying movements of United States troops.

The shipments were all made upon Government bills of lading bearing such notations as "10 cars baggage free allowance of 150 pounds per man for 46 officers, 1,246 enlisted men, and 22 teamsters" (Finding of Fact IV, item 11, Rec. p. 11); "allow 150 pounds each for 101 men, 15,150 free" (item 20, p. 14).

The notation upon each bill of lading was in conformity with the transportation rates agreed upon for that shipment, as shown by a letter of the Chief Quartermaster of the Department of the Gulf (Finding IV), by a resolution of the Southeastern Passenger Association (Finding VII), or by the "tariff rates" (Finding VI).

Settlements were made with the Florida Central & Peninsular Railroad Company, the final carrier, and

were for the full amounts stated in the vouchers that company rendered to the Government. The company, without protest, accepted, retained, and gave its receipt in full for such payments. No claim for unauthorized baggage deductions was made by the Florida Central & Peninsular Railroad Company or by any other person prior to the institution of the present suit, except as to items 1, 2, 3, 4, and 16 (R. pp. 7, 8, 9), for which action was brought at or about the same time by the Southern Railway Company, the initial carrier in those shipments, in which action that claimant recovered judgment. (Finding IV, p. 9.) This suit and that of the Southern Railway Co. were filed in April, 1904, more than five years after the troop movements occurred.

In the meantime and on the 27th day of June, 1903, the Florida Central & Peninsular Railroad Co. and the Seaboard Air Line Railway Co., a corporation organized and existing under the laws of Virginia, North Carolina, South Carolina, Georgia, and Alabama (finding I, R. p. 4), entered into an agreement called "Articles of agreement of merger and consolidation," prescribing the terms and conditions of the merger and consolidation. Article X of that agreement provided that "the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as

effectually as they were in the former companies" (R. p. 5).

The claimant went to trial upon an amended petition alleging its rights in the claim in suit in these words (par. I, p. 1):

> Petitioner is a corporation organized under the laws of the State of Virginia. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia. It now owns and operates also railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded. One of said corporations was the Florida Central and Peninsular Railroad Company.

A general traverse was entered in behalf of the defendant. (R. p. 3.)

At the first opportunity, or when the facts constituting the merger appeared at the trial, objection was duly made that the plaintiff had no rights in the alleged claim which were capable of enforcement, by reason of the provisions of section 3477 of the Revised Statutes, which is as follows:

> SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely

> null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The court, upon the facts as found by it, sustained the objection and dismissed the petition.

ARGUMENT.

I. The claim sued upon is void under Section 3477 R. S.

Section 3477 of the Revised Statutes makes assignments and transfers of claims against the Government, prior to allowance, absolutely null and void. The claim in suit was transferred to the plaintiff by the terms of a voluntary agreement. The claim therefore never accrued to the plaintiff as an actionable right against the United States.

National Bank of Commerce v. *Downie*, 218 U. S. 345, 353.

St. Paul & Duluth R. R. Co. v. *United States*, 112 U. S. 733, 736.

Spofford v. *Kirk*, 97 U. S. 484, 488.

It is true this court has held that a transfer by operation of law does not come within the inhibition of that statute. *Erwin* v. *United States*, 97 U. S. 382; *Goodman* v. *Niblack*, 102 U. S. 556; *Price* v. *Forrest*, 173 U. S. 410; but it is not true that the consolidation of these corporations, as by operation of law, created the plaintiff's title to the alleged claim. On the contrary, the consolidation was itself created by the transfer to the new company of the former company's properties, including this alleged claim. This is manifest from the provisions of the "Articles of agreement of merger and consolidation" set out in Finding of Fact I, pages 4–5. From this agreement it is evident that no judicial or other procedure at law was invoked to bring about the merger; that the law in no way operated in the matter further than to give effect to the agreement as a lawful one between the parties.

The original Seaboard Air Line Railway is not the plaintiff in this action. That company was originally organized under the laws of the State of Virginia, and by duly authorized consolidations or mergers with corporations operating railroads in Virginia, North Carolina, South Carolina, Georgia, and Alabama had become a consolidated corporation under the laws of those States. (Finding of Fact I, p. 4.) That consolidated company was one of the two constituent companies consolidated in a new corporation, the plaintiff in this action. The other constituent corporation was the Florida Central & Peninsular Railroad Co., a corporation duly incorporated and

operated under and by virtue of the laws of the States of Florida and Georgia. (Finding I, p. 4.) The transaction was, therefore, not merely a merger of the Florida Central & Peninsular Railroad Co. with and an absorption of it by an already existing corporation of the same name as this plaintiff, with the effect that the Florida company's properties melted into those of an existing corporation which thereby acquired the Florida company's rights *as they existed in that company*, by a process of legal succession, and so by operation of law. There was only a chronological and contractual succession, and this was by the voluntary act of the parties. The claim sued upon was transferred by the voluntary action of its owner. It was not acquired by operation of law. The law permitted the transfer, but it did not initiate it, prescribe any of the terms or conditions on which it was made, or have any operative effect upon the transaction. It is a transfer of this kind that is within the inhibition of section 3477 as construed by this court.

The plaintiff corporation came into being as a new and distinct entity by force of the substitution of its capital stock for and in the place of the capital stock of the constituent companies, which was converted into that of the consolidated company in the manner provided for in the agreement of merger and consolidation. (Finding of Fact I, p. 5.) That agreement was made under the authority of the statutes of the States of Georgia and Florida. (Finding of Fact I, p. 6), which statutes did not prescribe its

terms. (These statutes are printed as an appendix to this brief, p. 18.)

The statutes themselves did not effect a merger, but rather they authorized an agreement of consolidation which had the effect of creating a new corporation in lieu and in place of the former corporations, as in *Railroad Co.* v. *Georgia*, 98 U. S. 359, 363.

"It is usual," said the court in *John Hancock M. L. I. Co.* v. *Worcester N. & R. R. Co.*, 149 Mass. 214, "for consolidating statutes to introduce more or less of the element of succession or continuity of legal person as to existing rights and duties, notwithstanding that in other respects the old and new corporations are not the same. It is for the legislature to say how far the new corporation shall be, as it were, the heir, executor or continuer of the old." In *University of Vermont and State Agricultural College* v. *Chester Baxter's Estate*, 42 Vt. 99, notes were executed to the University of Vermont; that corporation and another were united under the plaintiff's name, and as such brought suit on the notes. The statutes declared that upon the organization of the new corporation and upon certain votes being had, all the property of each of the former should be vested in it. It was held that the real estate vested in the new corporation by the terms of the statute, and that while the statute was silent as to the personalty, nevertheless the personalty, although without assignment, also vested in the new corporation, and by virtue of the statute the plaintiff was substituted for the original payee and might bring suit as such.

So while the status of the old and new corporations after consolidation is for certain purposes determined by the terms of the statutes and the agreement under which the consolidation is formed, yet even if these statutes and this agreement expressly provided that the particular chose in action in suit should, by force of the consolidation there authorized, be transferred from the Florida Central & Peninsular Railroad Co. to the plaintiff precisely as it existed in the former company, unless the formalities required by section 3477 were complied with the State legislation would have been ineffectual to override the Federal requirements.

The agreement of merger and consolidation provided (Finding of Fact I, p. 5):

> Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way, and every other interest shall be as effectually the property of the consolidated company as they were of the

> former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it.

The claim in suit was one of the items of the property transferred by this agreement. The agreement amounted to no more than any other agreement whereby title to choses in action is transferred, and but for section 3477 of the Revised Statutes it would have operated effectually to give the plaintiff a right to maintain this action. But the claim in suit was in the hands of the Florida Central & Peninsular Railroad Co. burdened with a potential infirmity, imposed upon it by section 3477, which makes the transfer of such claim "absolutely null and void" unless it is freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Moreover, that section requires that "such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained

the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The transfer was not by operation of law and was not made in the manner and with the preliminary formalities required by the statute; the potential infirmities with which the alleged claim was burdened in the hands of the Florida Central & Peninsular Railroad Co. became actual infirmities when the transfer was made, destroying the life of the claim as an enforceable chose in action in the hands of the plaintiff.

II. The objection of the Government was jurisdictional and was not even necessary.

The defendant's objection to the plaintiff's right to maintain the action was timely, though unnecessary. The objection was not merely to claimant's capacity to maintain the suit, but rather to the jurisdiction in the broadest sense. The objection could not have been made specifically to the petition, for the petition states no cause of action; and, until proof was offered, there was not only no allegation as to how and when plaintiff acquired the claim, but no allegation as to how the claim accrued or as to what railroad performed the services upon which it was based. It was incumbent upon plaintiff to prove that a valid claim existed and that it owned the claim. Nothing but a confession of judgment can waive this proof. Where, as in this case, there is an entire failure of subject matter to which the jurisdiction of any court can attach, it is the clear duty of the court to take notice of that fact of its own motion.

Section 165 of the Judicial Code provides:

> When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.

This provision is mandatory upon the Court of Claims. When it appeared on the record in the court below that the merger by which the plaintiff acquired its title to the claim was worked by voluntary agreement in the nature of a purchase and sale, it became obvious that the transfer was within the inhibition of section 3477 and that the plaintiff could not recover upon the claim in any court. Clearly, further proof of the merits of the cause of action could not thereafter have aided the plaintiff in any way. Section 3477 of the Revised Statutes "is made to operate directly on the claims themselves, and not as limitations on, or definitions of, the powers of those who are to adjust them or adjudicate upon them. (*U. S.* v. *Gillis*, 95 U. S. 407, 415.)

The Court of Claims is not bound by special rules of pleading. (*District of Columbia* v. *Barnes*, 197 U. S. 146, 154.) Assuming that the averments of the petition, amounting only to a conclusion of law, without any statement of essential facts, purported to show the claimant's right to recover for alleged underpayment to the Florida Central & Peninsular Railroad Co., these averments were, if sufficient for any purpose, so broad and general in their terms as to admit proof of either a voluntary assignment of the

claim or a transfer by operation of law. This sweeping and comprehensive allegation, wholly lacking as it was in specific recitals of the facts constituting the merger, required only a general traverse to raise an issue. For the purpose of impeaching the right of the claimant to collect the amount, if any, due the original owner of the claim, this was equivalent to a plea in bar, not in abatement of the action; for it denied the claimant's right to sue upon the alleged claim not only in the Court of Claims but in any court. It had the effect of putting plaintiff to its proof and its proof failed.

A situation similar to that in this case was before this court in *Insurance Company* v. *Lewis*, 97 U. S. 682. In the case there under review Lewis, a public administrator, had assumed authority to bring an action as such against the insurance company upon a policy of insurance. It was established at the trial that Lewis had no such authority. Judgment, however, was rendered in his favor but was reversed by this court. The following language taken from the opinion of Mr. Justice Harlan is directly applicable here:

> But it is further contended that the answer, which relied upon these objections to the action, was in the nature of a plea in abatement, and that such objections were, according to establish rules of practice in the Federal courts, waived when the company answered to the merits without first having the court dispose of the issue as to Lewis's right to maintain the action. This position is, however,

> wholly untenable. The defense, so far as it impeached the authority of Lewis, by virtue of his appointment as public administrator, to collect the amount, if any, due on the policy, was in bar, not in abatement, of the action. The defense, if true, did not question his capacity as such administrator to perform any of the duties imposed upon him by law. It only insisted that he, as such lawfully appointed administrator, had no cause of action against the company upon the alleged contract of insurance.
>
> What we have said is decisive of the case, and we are consequently relieved from the necessity of inquiring whether the policy sued on was ever delivered to or accepted by Berton, so as to be binding upon the insurance company. That question can only arise in an action against the company by one who is entitled by law to represent his estate.

In that case the claim against the Insurance Company was null and void in the hands of Lewis as public administrator for purposes of enforcing it in any court of law; for he was not authorized in that capacity to bring any action upon it. Similarly in this case the claim in suit is null and void in the hands of the Seaboard Air Line Railway as assignee, by reason of the positive inhibition contained in Section 3477.

APPELLANT'S MOTION FOR DIMINUTION OF RECORD OR REMAND TO THE COURT OF CLAIMS.

The second group of cases cited on page 34 of the appellant's brief on this motion to support the proposition that an affirmance of this judgment will

determine all questions in defendant's favor, in fact go no further than to hold that when constitutional questions are involved in a general judgment or decree on the merits the appeal to this court brings the whole case here. Those cases do not hold that the same rule applies where appeals from such judgments involve merely jurisdictional questions; and this for the reason that while this court will always review constitutional questions and properly to do so must have the entire record before it, the same considerations do not apply to questions purely jurisdictional.

If this court decides that the appellant is barred by Section 3477 from maintaining an action upon this claim, the appellant will in no way be prejudiced by the findings of fact on the merits, and could not be helped by the granting of permission to supplement the proof made by it in the court below.

It was conceded by the court below (Op. R., p. 24) that the proper withdrawal at the trial by the Assistant Attorney General of a certain stipulation upon which previous cases had been tried, and upon which up to that time the plaintiff had relied, might be a ground of surprise which would authorize a continuance in order that the proof theretofore considered as covered by the stipulation might be made; but the court was at that juncture confronted by the fact that the plaintiff could not in any event maintain the action, regardless of proof on the merits, because of section 3477 of the Revised Statutes. The trial court denied this relief to the plaintiff only because that

section required such a ruling under section 165 of the Judicial Code, hereinbefore quoted.

Furthermore, the ruling of the trial court had the effect of construing as a demurrer the defendant's objection to the plaintiff's right to maintain the action.

A court which is not empowered to grant relief whatever the merits may be, can not decide what the merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res adjudicata* on the merits.

Murray v. *Pocatello*, 226 U. S. 318.

It would seem that the reason for this motion has been removed by the actual printing and filing of the transcript of record, which contains the findings objected to. They are now before this court for such consideration and application as it deems proper to give them. The court will consider these findings before it or otherwise, as it seems proper.

The Government is entitled as a matter of right to have the findings stand as found, not only because they tend to strengthen the defendant's contention on the question of jurisdiction, but particularly in view of the fact that Findings III–VII bear directly upon the effect of the settlements made with the Florida Central & Peninsular Railroad Company for the full sums stated in the vouchers, which sums that company, without protest, accepted and retained, and for which it gave receipts in full. (Finding III.) Such a course of conduct, coupled with a subsequent

assignment of a claim the subject matter of which was covered by such payments, in itself is sufficient to brand the claim in the hands of whomsoever it may be with the infirmity wrought by the principle of well-settled cases, that the receipt of payment, purporting to be in full, where there is no fraud or coercion, can not afterwards be repudiated as insufficient.

United States v. *Garlinger*, 169 U. S. 316, 322.

As bearing upon these points the Government is entitled to have the record of the trial before this court precisely as it stood at the time the court below concluded that upon that record the plaintiff could not maintain the action as a matter of law.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

FRANK DAVIS, Jr.,
Assistant Attorney General.
CROWLEY WENTWORTH,
Special Assistant to the Attorney General.

MARCH, 1920.

APPENDIX.

Code of Georgia (1895), sections 2173 and 2179; Code 1914, sections 2591 and 2597 (acts 1892, pp. 49 and 51):

> Contracts to connect, merge, or consolidate with or purchase, etc., other companies: Said railroad company shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said company to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest: *Provided*, That no railroad shall purchase a competing line of railroad or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law.
>
> Sale, etc., to, or consolidation with, other companies: Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer

its stock, property, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad within or without this State shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other State or the United States, whose railroad within or without this State shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporations, organized under the laws of this State, and any other States, with one or more companies or corporations organized under the laws of any other State, or under the laws of this and other States, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the

amount authorized by the laws of the State under which either of said companies, or corporations, so consolidated was organized, and to secure the same, in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this State: *Provided*, That no railroad company shall make any contract under the provisions of this section with any other railroad company which is a competing line, that is calculated to defeat or lessen competition in this State or to encourage monopoly.

Florida Compiled Laws, sections 2812 and 2815:

"Consolidation, lease and purchase: Any railroad or canal company in this State shall have the power, and authority is hereby granted, to make and enter into contracts with any railroad or canal company which has constructed or shall hereafter construct any railroad or canal within this State or in another State as will enable said companies to run their roads in connection with each other, and to merge their stock, or to consolidate with any company within or without this State, or to lease and purchase the stock and property of any such company, and hold, use and occupy the same in such manner as they shall deem most beneficial to their interests.

* * * * *

(Ch. 1987, acts 1885, 28; ch. 3745, act 1887, 1; ch. 6230, June 3, 1911, 1, amending 2812, Gen. St.)

Companies incorporated in other States may construct or own lines in this State: Any rail-

road or canal company already or hereafter organized under or by virtue of the laws of any other State or Territory, desiring to extend or construct any part of the whole of its line or lines of railroad or canal in this State shall, upon filing in the office of the Secretary of State a copy of its charter or charters, be entitled to all the powers and privileges, and be subject to all the liabilities enjoyed by and imposed upon domestic companies of the same nature. Whenever a railroad company organized under and by virtue of the laws of another State becomes the owner of a line of road already completed in this State, said railroad company, upon filing in the office of the Secretary of State a copy of its charter or reorganization either before or after the enactment of this provision, shall be entitled to the said powers and privileges and subject to the said liabilities enjoyed by and imposed upon domestic companies of the same nature. (Ch. 3906, acts 1889, sec. 1, amended by ch. 4615, acts 1897, sec. 1.)"

○

Supreme Court of the United States.

October Term, 1918.

THE SEABOARD AIR LINE RAILWAY,
Appellant,
v.
THE UNITED STATES,
Appellee.
No. 748.

MOTION OF APPELLANT FOR DIMINUTION OF RECORD OR REMAND TO COURT OF CLAIMS.

Appellant by its attorney shows to the court the following-stated facts:

1. This case relates to the compensation due from the United States for freights transported with divers bodies of troops during and after the war with Spain. The movements in question passed over and terminated on the lines of the Florida Central & Peninsular Railroad Company. That company, before the suit was brought, was merged into the claimant corporation, and the latter sues as its successor in title to all choses in action.

2. Before and during the war with Spain accounting officers of the United States, in making settlement with railroad companies on certain movements of troops, took the ground that, since railroad passengers were entitled to free carriage of personal baggage to the amount of 150 pounds per capita, the Government, when army impedimenta or supplies were

carried with troops, was relieved of freight charges on those to the amount which, with the personal baggage carried, made up an aggregate of 150 pounds per man. The Second Comptroller or the Comptroller of the Treasury, upon appeals, three times disapproved this ruling and awarded the railroad companies compensation for the carriage of the freights concerned. The Comptroller in the latest of these decisions, which was rendered on October 30, 1901, and in which the two decisions of the Second Comptroller were quoted (8 Compt. 264) said that when personal baggage and impedimenta had been placed together in the same cars the free baggage allowance should be made by determining the average weight of the personal baggage carried for each person and multiplying it by the number of persons carried. In the movements here concerned the railroad companies furnished separate cars for personal baggage, but into those cars and into freight cars the Government's officers loaded army impedimenta and supplies and other Government property along with such personal baggage as the enlisted men did not keep with them in the passenger cars. The baggage was not weighed nor estimated separately. When the bills were computed and paid deduction was made at the flat rate of 150 pounds per man from the entire weights hauled. The compensation so denied, to the extent that it dealt with freights, is the subject of this suit.

3. Suits on the same cause of action have been prosecuted in the Court of Claims by fifteen railroad companies beside the present claimant and were brought to judgment in the years 1906 to 1916. The decisions in all these cases were in the claimants' favor.

4. In four of said other cases there was presented

and argued the defense that the term "baggage" included tents and other paraphernalia of troops. In four of said cases there was presented and argued the defense that notations written upon bills of lading by the Government's officers for "free allowance" or "deductions" of 150 pounds per man constituted contracts for the free carriage of freights as well as baggage to said amount. In three of said cases there was presented and argued the defense that, under admonitions from disbursing officers of the Government that they would not pay for any larger amounts of freights, the claimant company had prepared and presented to such officers bills carrying those identical diminutions of weights against which the suits complained. In six of said cases there was presented and argued the defense that the claimant company had, without protest, accepted payment for such diminished amounts of freight. Each of said defenses was made both by briefs and by oral argument. On each of said questions, in every case, the decision of the Court of Claims was in favor of the claimant.

5. There were presented and argued in the present case all of said defenses except only the presentation of bills for diminished weights of freights, and, with respect to the greater part of said movements no defense was made in this case, touching on the merits of the claim, which had not been made in said other cases.

6. On the 9th day of April, 1917, a decision was made by the Court of Claims to the effect (*a*) that said merger of the Florida Central & Peninsular Railroad Company with the claimant corporation was a voluntary assignment of choses in action to which Section 3477 of the Revised Statutes was pertinent, and therefore it did not give the claimant corporation

any power to prosecute the suit, and (*b*) that there was no right of recovery for any claimant whomsoever. Findings of fact and a conclusion of law on both of the issues so determined, and an opinion, were filed.

7. Upon a motion for a new trial and amendment of findings of fact the Court of Claims on January 7, 1918, filed the new opinion which is set out in the record. Except in its concluding paragraphs, said opinion treats of the one issue of the claimant corporation's capacity to maintain the action. Referring to that question the opinion, in the closing paragraph, says:

> "The conclusions reached upon the question discussed necessarily determines the right of this plaintiff to maintain this action and requires an adverse judgment.
>
> "In our former opinion in this case while announcing the views above suggested as to the right of the plaintiff to maintain the action we went further and discussed the case as presented by the findings of fact. We called attention to the fact that a stipulation which had been made in a number of cases similar to the one at bar (except the question of assignment), and upon which the other cases had been tried, had been withdrawn by the Assistant Attorney General in this case, who declined to be bound by it. We recognized the rule stated by Judge Howry in the case of *Jones & Laughlin* v. *United States*, 42 Ct. Cls. 178, but we also called attention to the fact that the plaintiff had not asked a continuance of the case when the stipulation was withdrawn. That the withdrawal of the stipulation upon which, up to that time, the plaintiff had relied might be a ground of surprise, which would authorize a continuance in order to enable the parties to supply by proof what they thought was proved by the stipulation, we have no doubt. Plaintiff now by a motion for a rehearing asks leave of the

court to supply the requisite proof. Some proof has been taken in other cases of a similar kind to this but that proof was not brought into this case nor was it considered by the court in the original hearing. Some affidavits are filed with plaintiff's motion for a rehearing, some of which are to the effect that the settlements which were made and which the plaintiff seeks to question, were made by the accounting officers taking the bills of lading with the notations thereon and treating them as accurate exponents of the facts instead of taking the bills presented by the railroad companies themselves. Though the suit was brought in April, 1904, and was not presented to this court for decision until March, 1917, nearly 13 years, we might afford the plaintiff an opportunity of taking additional proof because largely of the surprise to which it was probably put by the withdrawal of said stipulation which affected some but not all of the questions involved in the case. But we are met by the fact that in our opinion plaintiff can not maintain the action because of Section 3477 above discussed. And Section 165 of the Judicial Code provides: 'When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.' Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result.

"The finding of fact show the case as it was presented on the former hearing, and our former opinion in the case will be withdrawn and this opinion substituted therefor.

"For the reasons stated the motion for a rehearing will be overruled."

(Typewritten record, p. 25.)

The court's conclusion of law, following its findings of fact, was as follows:

"Upon the facts found the court concludes as a matter of law that the plaintiff is not entitled to recover and that its petition ought to be and it is dismissed."

(Typewritten record, p. 20.)

8. Following is the text of the court's judgment:

"At a Court of Claims held in the city of Washington on the seventh day of January, A. D., 1918, judgment was ordered to be entered as follows:

"The court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Seaboard Air Line Railway, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States; and that claimant's petition be and it hereby is dismissed."

(Typewritten record, p. 27.)

9. All of the claimant's records and papers pertinent to this claim, with the offices in which they were kept, had been destroyed by fire and no evidence peculiar to this case was submitted on claimant's part except a certified copy of the proceedings by which the Florida, Central & Peninsular Railroad Company was merged into the claimant corporation. Proof of the several movements, and of the deductions, described in the petition, from the compensation therefor was made by reports from the War and Treasury Departments, filed on the part of the Government. In the first of said other cases which was brought to trial, viz., that of the Chicago & Northwestern Railway Company, No. 24,893, depositions of a number of quartermaster officers of the army were taken on the claimant's part in reference to the methods pursued by army officers in and after the War with Spain

in the loading of baggage and freights moved with troops and to the average quantity of baggage mixed with freights in baggage or freight cars, which testimony did not relate especially to the transactions which were the subjects of suit in that case, but to such movements generally, occurring during the time stated, on all railroad lines. On the basis of that evidence a stipulation of counsel was signed fixing the average quantity of baggage per passenger which, in computing the amounts of compensation at issue, should be subtracted from said total weights of 150 pounds per man for which compensation had been withheld. No proof was made for the Government on that subject in said case, nor in any others of said previous cases, and none was made in the present case. In all of said previous cases, following said case No. 24,893 said stipulation, filed in that case, was treated as a part of the record and was copied by the court into its findings of fact. The customs and other terms under which the shipments of the present case were made, and all other elements of the case as so established, were identical, except as to names, dates, places and like details, with those which had been considered and adjudicated by the court in said former cases.

10. Before or at the hearing, by motions and the filing of extracts, all in accordance with the rules and practice of the Court of Claims, there were brought into the present case much evidence that had been submitted in said former cases relating to the particular defenses hereinbefore narrated. Among such evidence were the identical depositions which had been the basis of said stipulation in the case of the Chicago & Northwestern Railway Company (See certificate, Exhibit A, hereto).

11. In a brief filed on behalf of the claimant said stipulation described in paragraph 9 hereinbefore was referred to and was copied. A brief was filed by the Attorney for the United States having the defense of the case immediately in charge, in which the interpretation to be put on said stipulation was discussed and no objection was made to the competence and pertinence of the stipulation to this case. At the hearing the Assistant Attorney General, who had taken charge of the defense, objected orally to said stipulation and moved its exclusion from the record. Counsel for the claimant pointed out why, in his judgment, the objection was not valid. The court made no ruling on said motion, and claimant's counsel received no intimation until said first decision of the case was announced that the court treated the stipulation as stricken from the record; and so no opportunity was afforded claimant to ask for a continuance in order to supplement its proof (See extract from brief, Exhibit B, herein).

12. The hearing commenced on February 20, 1917. Said Assistant Attorney General then stated his belief that the bills which had been filed by said Florida Central & Peninsular Railroad Company in reference to the freight movements which are the subject of the suit were at those same diminished weights of freight on which payment was made and of which the suit complains. The court then, in order to afford an opportunity to produce such bills, continued the hearing until the 27th day of the same month. At that time, the hearing being resumed, the Assistant Attorney General informed the court that the bills referred to could not be found and that he had no proof that such bills as he had described were filed. In making its decision the first time, as stated in its opinion, the

court assumed that bills of that nature were filed and referred to them as evidence of an understanding on the part of the railroad company, at the time of said movements, that free carriage was due for freights of the amount stated, as well as for the personal baggage transported. In fact the bills of said railroad company were computed and rendered, and compensation claimed, for the full weights of freights carried in all of said movements.

13. At the hearing said Assistant Attorney General commented on said proofs which had been brought into the record from other cases, as narrated in paragraph 10 hereinbefore, and expressed doubts of the competence thereof, and thereupon the court announced that the method by which the proofs had been brought in was proper and that they would be considered as evidence wherever relevant; and thereafter, until said first decision was announced, claimant had no intimation that such proofs would not be considered by the court.

14. In November, 1898, which was subsequent to most of the troop movements with which this case is concerned, the railroad companies of the southeastern part of the United States proposed to the Quartermaster General of the Army (*a*) that camp equipage, and other army paraphernalia which were expected to be carried with the soldiers, to-wit, in passenger trains, could be considered as baggage and (*b*) that certain stipulated rates should be paid for all weights of such matter in excess of 150 pounds per passenger. On the Government's part there was no acceptance of said proposition. Said special rates were much higher than the rates applying to such matter as freights; and if said tender had been applied to the movements proved in this case the railroad company's compensa-

tion, computed upon the net weights so established, would in each case have been more than actually was paid to it. The Court of Claims set out said tender in the findings of fact (typewritten record, p. 20), but did not state that same was not accepted; and, though in its first opinion it referred to the same as indicating the meaning of the term "baggage," it did not revise the payments which had been made with respect to the excess weights so as to state the increase of compensation which would be due upon the application of said tender in its entirety.

15. In support of its said motion for a new trial claimant filed in the Court of Claims the affidavits referred to in the second opinion of the court. Some of said affidavits related to the character of the bills filed by the Florida Central & Peninsular Railroad Company and to the method by which vouchers were prepared, on which payment was made by a disbursing officer of the Government. A copy of one of those affidavits is appended hereto as Exhibit C.

16. Following said second decision of the Court of Claims claimant filed two successive motions, with briefs thereon, to strike out of the findings of fact all but the first paragraph. Both of said motions were overruled by the court. Thereafter, when applying for appeal to this court, claimant filed a motion in the Court of Claims for the omission from the transcript in the appeal of all of the findings of fact except said first paragraph. Said motion was overruled by the court. A copy of the second motion to strike findings from the record and of the motion for omission of findings is appended hereto as Exhibit D.

17. In quoting, with reference to some of the movements concerned, a letter written by one Colonel Lee, purporting to state terms which had been fixed between

Government officers and the railroad companies concerned, the court ignored the agreement itself, though that was in evidence. It is radically different from Colonel Lee's recital concerning it. It stipulates as a precaution, the ordinary free carriage, to-wit, of *baggage*.

Attached hereto as Exhibit E is a copy of paragraphs I and II of the three first sentences in paragraph III of the findings of fact hereinbefore referred to, which were made by the Court of Claims upon the original hearing and retained when a second decision was made.

The premises considered, appellant moves that this court, in the printing of the transcript brought to it from the Court of Claims, will cause to be excepted and omitted the paragraphs in the findings of fact numbered III to VII inclusive; also the conclusion of law which follows the finding of fact. As an alternative, appellant moves that the case be remanded to the Court of Claims with directions to make its findings of fact and conclusion of law anew and to confine them to the question of the capacity of appellant, as successor in title to the Florida Central & Peninsular Railroad Company, to maintain this action.

BENJAMIN CARTER,
Attorney for Appellant.

Exhibit A.

IN THE COURT OF CLAIMS.

SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES.
No. 24,915.

CLAIMANT'S MOTION TO WITHDRAW CERTAIN PAPERS FROM CERTAIN CASES.

Comes now the claimant by its attorney and moves the court for permission to withdraw from the files of the court, temporarily, for use in the trial of the above entitled case, so far as the same may be competent, relevant and material, the following papers:

Chicago & Northwestern Ry. Co. *v.* U. S., No. 24,893.
- Findings of Fact and Conclusion of Law. Filed June 11, 1906.
- Deposition of Richard D. Simms. Filed February 8, 1905.
- Deposition of A. D. Bright. Filed February 8, 1905.
- Deposition of Ferd F. Putnam. Filed February 7, 1905.
- Deposition of William E. Mickle, Jr. Filed February 26, 1905.

Pennsylvania Railroad Co. *v.* U. S., No. 24,897.
- Findings of Fact and Conclusion of Law. Filed June 9, 1910.
- Deposition of Amos H. Stephens. Filed May 25, 1910.

Southern Railway Co. *v.* U. S., No. 24,913A.
- Findings of Fact and Conclusion of Law. Filed February 8, 1909.
- Exhibit A. Filed April 16, 1908.
- Deposition of E. T. Jones. Filed April 16, 1908.

Atlantic Coast Line Co. *v.* U. S., No. 24,914.
- Findings of Fact and Conclusions of Law. Filed May 20, 1909.

Chicago, Milwaukee & St. Paul Ry. Co. *v.* U. S., No. 24,895.
Findings of Fact and Conclusions of Law. Filed April 2, 1906.
Cincinnati, N. O. & Tex. Pac. Ry. Co. *v.* U. S., No. 24,920.
Findings of Fact and Conclusions of Law. Filed March 20, 1908.
Missouri Pacific Ry. Co. *v.* U. S., No. 24,907.
Findings of Fact and Conclusions of Law. Filed February 1, 1915.
Chicago, Rock Island & Pacific Ry. Co. *v.* U. S., No. 27,191.
Brief and Findings of Fact, etc. Filed May 18, 1905.

Allowed in open court.

SAML. A. PUTNAM, *Chief Clerk.*

BENJ. CARTER, *Attorney for Claimant.*

2-8-17.

(Motion filed February 8, 1917.

SECOND MOTION OF CLAIMANT TO WITHDRAW PAPERS FROM OTHER CASES.

Comes now the claimant by its attorney and moves the court for permission to withdraw from the files of the court, temporarily, for use in the trial of this case, so far as same may be competent, relative and material, the following papers in addition to those withdrawn from certain cases in claimant's motion allowed on the 8th day of February, 1917.

In the cases below (1) Findings of Fact and Conclusions of Law and (2) Report of Auditor for the War Department.

Chicago, Rock Island & Pacific Railway Co., No. 24,892.
Chicago & Alton Railroad Co., No. 24,901.
Chicago, Burlington & Quincy Railroad Co., No. 24,904.

Northern Pacific Railroad Co., No. 24,905.
Nashville, Chattanooga & St. Louis Railway, No. 24,918.

In the case of the Pennsylvania Railroad Co., No. 24,897, (1) Deposition of Colin Studds and (2) Report of Auditor for the War Department.

In the case of the Pennsylvania Company, No. 24,898, (1) Report of Auditor for the War Department and (2) Report of the Comptroller of the Treasury, filed on May 17, 1911.

In the case of the Southern Railway Company, No. 24,920, (1) Deposition of E. T. Jones with exhibits thereto and (2) Report of Auditor for the War Department.

In the case of the Louisville & Nashville Railroad Company, No. 24,917, Report of Auditor for the War Department and Exhibits B1 and B2 thereto.

In the cases below, Report of the Auditor for the War Department.

Chicago & Northwestern Railway Co., No. 24,893.
Chicago, Milwaukee & St. Paul Railway Co., No. 24,895.
Atlantic Coast Line Railroad Co., No. 24,914.
Missouri Pacific Railroad Co., No. 24,905.
Cincinnati, New Orleans & Texas Pacific Railway Co., No. 24,920.

In the case of the Chicago & Alton Railroad Co., No. 30,234, (1) certified record of merger of Chicago & Alton Railway Co. into Chicago & Alton Railroad Co. and (2) Findings of Fact and Conclusion of Law.

BENJ. CARTER,
Attorney for Claimant.

(Motion filed February 17, 1917.)

IN THE
COURT OF CLAIMS OF THE UNITED STATES.

SEABOARD AIR LINE RAILWAY CO.
v.
THE UNITED STATES.
No. 24,915.
February 23, 1917.

APPENDIX II.--Additional extracts from records in other cases.

EXTRACT FROM PROCEEDINGS OF MEETING OF SOUTHEASTERN PASSENGER ASSOCIATION HELD AT NORFOLK, VA., NOV. 15, 1898.

On motion, Resolved, That it is the sense of this Committee that during the period of time while the adjustment of rates with the War Department for the movement of troops agreed to by the Executive Officers at a meeting held in Washington, D. C., November 2d, is in effect, that in making bids for the movement of troops in Association Territory or into or through Association Territory to or from points beyond, net cash rates may be announced through the Chairman on the following basis for such movements as the Government may request bids.

For distance of 300 miles and under 2 cents per mile per capita plus arbitraries.

For distance of 301 to 343 miles, inclusive, rate of $6.00 per capita plus arbitraries.

For distance of 344 to 499 miles, inclusive, 1¾ cents per mile per capita plus arbitraries.

For distance of 500 to 583 miles, inclusive, rate of $8.73 per capita plus arbitraries.

For distance of 584 and over miles, 1½ cents per mile per capita plus arbitraries.

Regular tariff rates to apply for individuals or parties of less than ten.

When sleeping car accommodations are required, regular standard or tourist sleeping car rates to apply.

Each passenger to be allowed 150 pounds of baggage free of charge. All excess baggage moved with troops on same train or sections thereof to be charged for at the rate of 12 per cent per cwt. of the through passage fare for these movements. The term "baggage" as herein used being understood to mean personal baggage, tentage, camp equipage, accoutrements and rations needed for immediate use of troops, it being understood that rates for live stock, cannon, heavy ordnance, ambulances and wagons (set up or knocked down) shall be obtained from the freight departments and that all property connected with the movements of troops shall be loaded and unloaded without expense to the carriers.

(Report of Auditor for War Department in case of Louisville & Nashville Railroad Co., No. 24,917, "B" Exhibits 1, 2 and 3.)

FROM TESTIMONY OF COLIN STUDDS, IN CASE OF PENNSYLVANIA RAILROAD COMPANY, NO. 24,897.

20. Q. Did you prepare and submit bids for movements of United States volunteers from Dunn Loring and Thoroughfare, Va., to Middletown, Pa., in August and September, 1898? If you did, examine these two papers which I hand you, and say whether you recognize them as copies of your bids, and in that event cause them to be attached to this deposition as exhibits.

A. United States volunteers, Dunn Loring, Va., to Middletown, Pa.; this would seem to be my bid, I recognize it as such.

22. Q. Do you recall in a general way for what camp equipage and similar property accompanying these particular movements the Pennsylvania Railroad Company received pay from the Government?

A. As I recall it, we were forced to accept practi-

cally a fifty per cent reduction from what we were justly entitled to under the bids submitted and accepted by the Quartermaster's Department.

23. Q. Explain what you mean by fifty per cent?

A. I mean this, that my bid distinctly provided that we would allow one hundred and fifty pounds of personal baggage free, and when the bills of lading were returned, having been accomplished, there appeared thereon an endorsement by Colonel Guy Howard, Chief Quartermaster of the Second Division, I think, then at Dunn Loring. As near as I can recollect it was as follows: "Deduct one hundred and fifty pounds per capita;" and then our bill, which was prepared by our Auditor on the basis of our bid, was presented to the Disbursing Quartermaster he undertook to reduce the bill to conform to the endorsement of Colonel Guy Howard on the bill of lading, which practically forced upon the Pennsylvania Railroad the carriage of the entire impedimenta, equipage and stock (I think the stock was included) without compensation. Colonel True, the Depot Quartermaster at Washington, recognized the injustice of this and sought to give us relief, and after sundry conferences he made a proposition to give us a settlement on a basis of 50% of the cars, which settlement we accepted under protest, considering half a loaf better than no loaf at all, and under this settlement we were forced to carry, if I recall, approximately seventy-seven cars of freight free, notwithstanding the acceptance of the terms and conditions of our bid, which provided certain quotations or rates for the camp and garrison equipage and other impedimenta, including stock, and for the carriage only of one hundred and fifty pounds of personal baggage of officers and men free.

* * *

27. Q. In this settlement was any concession of any kind made by the Government to the Pennsylvania Railroad Company by way of setoff against this large concession made to the Government?

A. None whatsoever. It was all a one-sided propo-

sition, and we were put in the position that that was all they would pay us.

(These items of claims allowed in judgment of the court. See findings of fact and conclusion of law, pp. 6, 7.)

FROM REPORT OF COMPTROLLER OF THE TREASURY IN CASE OF PENNSYLVANIA COMPANY, NO. 24,898.

It is submitted that in all the items in this case the plaintiff *voluntarily* accepted the payments as made, and as in full settlement of the claims. In certain items payment was made as claimed; in other items certain deductions were made and the amounts thus found due were accepted in full. In all the items the adjudication and payment was voluntarily made and accepted as in full of all demands. It appears that this voluntary adjudication ought to estop the plaintiff from making any further demands. In this case there was no demand on the part of the Government that the plaintiff reduce his claim in order to receive payment, and the case is therefore not under the rule in which additional allowance was granted by the court because of forced deductions by the Government.

FROM FINDINGS OF FACT IN THE CASE OF NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, NO. 24,918.

VIII. In said movement No. 1 delivery was made at Tampa, Fla., by the Plant System of Railways, and by the practice of the railways and the disbursing officers of the United States, collection for said movement devolved upon said Plant System. Upon tender of payment for said movement by the proper quartermaster officer of the United States a controversy arose between him, on the one part, and claimant and said Plant System on the other part, regarding a deduction for 150 pounds of freight and baggage for each passenger and also on two other questions.

On August 10, 1900, the Auditor of Receipts of said Plant System wrote a letter to claimant's Auditor of

Receipts proposing terms for an adjustment of said controversy, a copy of which letter follows:

* * *

The matter then being before the Auditor for the War Department, claimant's Auditor of Receipts signified to said Auditor and to said Auditor of Receipts of said Plant System his assent to the settlement proposed in said letter, and thereupon said sum of $4,280.18 was allowed by said Auditor and was paid to said Plant System. In this settlement there was allowed and paid, both with respect to the rates for the transportation of wagons and with respect to the weights of the nine carloads of equipage, considerably more than had been offered by the disbursing Quartermaster.

X. Except for the controversy shown by finding 8 above, it does not appear that the claimant, in accepting said reduced amounts allowed by the accounting officers of the United States, filed any protests or objections against the disallowance of the full compensation for the freight transported.

CONCLUSION OF LAW. Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant recover judgment of and from the United States in the sum of eighteen thousand one hundred and fifty-six dollars and three cents ($18,156.03).

[This did *not* include the $4,280.18, *supra.*]

FROM TESTIMONY OF J. R. BRICE (ACTING FREIGHT AUDITOR) IN CASE OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., No. 24,895. Page 2 of deposition.)

We tried to collect our bills as originally rendered but payment was refused.

FROM FINDINGS OF FACT IN THE CASE OF CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY, No. 24,920.

VI. In arranging settlement for the movement Numbered 18 mentioned in Finding II, the disbursing

Quartermaster made a deduction of $2,933.01 from the bill presented by the Lexington & Eastern Railroad which was the terminal road and had according to practice of railroads assumed the collection of compensation for said movement. The Auditor for said Lexington & Eastern Railroad declined to accept such deduction and agreed to a deduction of $2,116.80 and no more. Subsequently the accounting officers of the Treasury made a settlement on this item making a deduction of $2,158.80 and a warrant in accordance therewith was mailed to said Lexington & Eastern Railroad Company by the Treasury Department.

It does not appear that said railroad company made any protest upon receipt of said warrant or afterwards.

[Claim allowed by court as to said entire deduction of $2,158.80 claimed. See paragraphs VII and VIII of Findings of Fact and Conclusion of Law.]

COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

I, Sam'l A. Putman, Chief Clerk of the Court of Claims of the United States, hereby certify that the foregoing is a true copy of (1) a motion filed on the 8th day of February, 1917, (2) a motion filed on the 17th day of February, 1917, (3) a paper entitled "APPENDIX II—Additional extracts from records in other cases," filed February 23, 1917, in this office in the above entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this tenth day of December, A. D., 1918.

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Exhibit B.

IN THE COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

EXTRACT FROM BRIEF OF DEFENDANT FILED ON JANUARY 29, 1917.

The stipulation between the claimant company and the Government was entered into with regard to these "personal baggage cases" in the case of the Chicago Northwestern Railway Company, No. 24,893, which stipulation is printed in the claimant's brief at page 48. From the stipulation it does not appear what amount of baggage if any, the volunteer troops were to be regarded as having carried when changing station. Both Messrs. Carter and Ashford insist that by the stipulation referred to it was agreed that volunteer troops going to the front were to be regarded as having no baggage. This stipulation has been before the court several times, and the Government's present counsel has no knowledge as to what was intended by the stipulation with regard to volunteer troops, as the stipulation is silent upon that question. We will accept, subject to the court's approval, the interpretation placed upon the stipulation by the claimant's counsel.

* * *

(Signed) HORACE S. WHITMAN,
Attorney for Defendant.

Exhibit C.

STATE OF VIRGINIA } ss:
City of Portsmouth. }

Before me, J. C. Proctor, Jr., a Notary Public in and for said State and city, appeared this day B. B. McCaa, who, being by me sworn, made oath and said that for years past, including the war between the United States and Spain and the Philippine insurrection, payments to eastern and southern railroad companies for movements of United States troops and for freights appurtenant thereto have been made in the main by the Depot Quartermaster of the United States Army at Washington in the District of Columbia; that by reason of the Spanish war the volume of such business in said office, especially as to the southern roads, increased so that it was necessary for said Quartermaster to employ, and he did employ for some months in 1898 and 1899 a number of clerks for the special purpose of handling claims of the railroad companies and preparing the settlements to be made thereupon, and affiant was one of those clerks; that affiant's especial duty under this employment was to examine the accounts of the Florida Central & Peninsular Railroad Company and prepare the settlements of the same, and therefore the accounts of said company were almost universally handled by him, and he also handled a considerable number of accounts of other railroad companies and had much conference with the clerks who chiefly handled the accounts of those other companies and with the other clerks in said office having charge of such business; that bills or claims were prepared by officers of said Florida Central & Peninsular Railroad Company in its general offices at Jacksonville, Florida, and were sent, usually by express, with way bills and expense bills attached, to said Quartermaster, the way bills being prepared by agents of the railroad lines with which the movements originated and the expense bills being prepared by agents of the Florida Central & Peninsular company

or by other lines with which the movements terminated; that such bills stated the full weights of freight transported, of each class named, without any deductions whatever for any free carriage, no claims being remembered by affiant in which a deduction was made; that the settlements prepared for such bills upon Quartermaster voucher forms, and the instructions given to affiant and said other clerks in said office for the preparation of such vouchers were, regarding the rates to be paid for, the classification of freights and the rates applicable thereto, to consult the bills of lading covering the movements, and said vouchers were in fact prepared (without reference to the claims of the railroad companies and way bills and expense bills) from and in accordance with the contents of and notations upon such bills of lading, which notations usually said, in substance "Deduct one hundred and fifty pounds for each passenger transported." Affiant further says that said bills of lading were written, and the notations upon the same made, by the army officer who shipped the property, and that the notes made later thereupon were written under the direction of the officer to whom the property was consigned; that in such shipments for Government account it was required that any erasure or interlineation or other notes be made by one of such officers and that the agent of the railroad company who received the property for shipment should write nothing upon the bill but his own name, at the place designated in the form. Affiant further says that it was not the practice in such business for the railroad company, in obtaining settlement, to file new bills after the accounts had been stated by affiant and said other clerks, and that affiant does not remember to have seen any bill of said Florida Central & Peninsular Railroad Company, or of any of said other railroad companies, in which said deduction from weights, to the amount of one hundred and fifty pounds per passenger, was made. Affiant further says that the same practice which he has stated herein as regards the Florida Central & Peninsular accounts was pursued

by the Baltimore & Ohio Railroad Company and by the other companies, as a rule, whose accounts were so handled and settled in said office, and that what he has stated regarding bills of the Florida Central & Peninsular Company applies as well to bills of the Baltimore & Ohio Railroad Company. Affiant further says that until after the 9th day of April, 1917, when, as he is informed, an adverse judgment was rendered by the Court of Claims upon a suit of the Seaboard Air Line Railway regarding such deductions to the amount of one hundred and fifty pounds per man, he had had no occasion to communicate and, so far as he recalls, he had never communicated to any officer of said company having charge of or connection with said suit, nor to the company's attorney in Washington who was prosecuting this suit, the facts herein stated regarding the nature of the bills presented by said Florida Central & Peninsular Railroad Company and the steps by which the same were settled and paid.

(Signed) B. B. McCaa.

Subscribed and sworn to before me this 26th day of September, 1917.

J. C. Proctor, Jr.,
Notary Public.

My commission expires April 9th, 1920.

[SEAL]

(Filed October 15, 1917.)

Exhibit D.

IN THE COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

RENEWED MOTION OF CLAIMANT IN RELATION TO FINDINGS OF FACT.

I.

Claimant by leave of court moves anew that there be stricken from the findings of fact filed in connection with a new opinion of the court delivered on January 7, 1918, all but the first findings. For grounds of said motion it says:

1. Said matter (Findings II to VII inclusive) has no pertinence to the matter decided by the court, viz., that the transactions by which claimant asserts ownership to the claim sued on did not make it the lawful owner of the claim.
2. That, having decided that the claimant was not the lawful owner of the claim sued on, the court was without power to proceed further and determine the facts upon which the merits of the suit rest.

Claimant moves further that the present conclusion of law, following the findings of fact, be stricken out and that, if the court still be of the opinion that claimant is not the lawful owner of this cause of action, the following, or its equivalent, be inserted in lieu thereof:

The court concludes that claimant acquired the cause of action sued on by a voluntary assignment, and is not the lawful owner of the same,

and therefore its petition ought to be and is dismissed.

This, claimant says, would follow as a corrollary upon the elimination of Findings II to VII inclusive.

Claimant further moves the court that, when said Findings II to VII have been stricken out, a second finding shall be made as below:

> After said consolidation no organization was maintained and no business done in the name of the Florida Central & Peninsular Railroad Company.
>
> Poor's Manual of Railroads, 1904, pp. 233, 234; 1907, pp. 97, 99.
> Official Railway Guide, years 1904 to 1914.
> Reports of Second Assistant Postmaster General, Tables of readjusted pay for railway mail service for years 1904 to 1914.
> Affidavit of James F. Wright.

II.

Claimant, as an alternative to all of the foregoing, moves that the judgment, with said findings of fact and conclusion of law and the opinion of the court, be set aside for the time being; that, upon a resubmission of the case on such proofs as the parties may be advised to offer, new findings of fact will be made on all points, but that, if the court be of its present opinion regarding the incapacity of the present claimant to maintain the suit, a conclusion of law and judgment will be entered again dismissing the petition on the ground alone of such incapacity. For ground of this motion claimant says:

> (1) The court, inadvertently it may be, upon its original consideration of the case, did proceed to make findings of fact on the merits after it had reached the conclusion that the Seaboard Air Line Railway has no standing in court, and

those findings were reaffirmed when the second action of the court was taken. It would seem entirely proper therefore to correct errors in those findings (if such errors be shown to the satisfaction of the court) *provided* the judgment when entered shall still be confined to the preliminary question indicated.

(2) Some deposition proof—which may not be taken unless the judgment be suspended—may be necessary in order to remove doubts which the court may have on questions affecting the merits of the claim.

(Motion filed May 9, 1918.)

APPLICATION OF CLAIMANT FOR APPEAL, WITH MOTION FOR RESTRICTION OF TRANSCRIPT.

Claimant prays hereby an appeal to the United States Supreme Court from the judgment rendered by this court on the 27th day of May, 1918, by which a renewed motion of claimant for amendment to the findings of fact was overruled and the judgment previously rendered, dismissing the petition, was affirmed.

In relation to the transcript of this court's record to be prepared for use in said appeal, claimant moves that there be omitted therefrom paragraphs II to VII, inclusive, of said findings of fact. For grounds of this motion claimant says:

1. Said portions of the findings are void because the court had no jurisdiction to make the same.

2. Paragraph I of the findings relates to the identity of the claimant and its competency to maintain the action, while said paragraphs II to VII relate to the merits of the claim, and the decision of the court, adverse to claimant and dismissing its petition, was upon said one question of claimant's standing in court; wherefore the court had no lawful authority to proceed to a consideration of, and make findings upon, the evidence which concerned the merits of the claim.

(Motion filed August 15, 1918.)

COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES.
No. 24,915.

I, Sam'l A. Putman, Chief Clerk of the Court of Claims of the United States, hereby certify that the foregoing is a true copy of two (2) motions filed respectively on May 9, 1918, and August 15, 1918, in this office in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this fifteenth day of November, A. D., 1918.

SAM'L A. PUTMAN,
Chief Clerk, Court of Claims.

[SEAL]

Exhibit E.

EXTRACT FROM FINAL FINDINGS OF FACT MADE BY COURT OF CLAIMS.

I.

The Seaboard Air Line Railway is a corporation formed, as hereinafter shown, by the consolidation of a corporation of the same name with another corporation, the Florida Central & Peninsular Railroad Co.

The Seaboard Air Line Railway was a corporation originally organized under the laws of the State of Virginia, and by duly authorized consolidations or merges with corporations operating railroads in those States had become a consolidated corporation under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia.

The petitioner, the Seaboard Air Line Railway, a corporation formed as hereinbefore stated, now owns and operates railroad lines in the said States and also the railroad lines that, until the consolidation herein mentioned, belonged to another corporation, the Florida Central & Peninsular Railroad Co.

On the 27th day of June, 1903, a company, described as "the Seaboard Air Line Railway, a consolidated corporation organized and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia, and Alabama," and the Florida Central & Peninsular Railroad Company, described as "a corporation duly incorporated and operated under and by virtue of the laws of the States of Florida and Georgia," entered into an agreement called "Articles of agreement of merger and consolidation," prescribing "the terms and conditions of said merger and consolidation and the mode of carrying the same into effect."

Article I was as follows:

"The capital stock, franchise, railroads, estates,

and properties, real, personal, and mixed, of the said Florida Central & Peninsular Railroad Co., shall be and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway, and are to be hereafter owned and controlled as one railroad company."

Article II was as follows:

"The name of said company so formed by the merger and consolidation and union of said railroad companies shall be, and is, the Seaboard Air Line Railway."

Article III prescribed the number of directors of said consolidated company, their officers, and the names of those who shall act as directors and officers until the first annual meeting of the stockholders.

Article IV prescribed where the offices of the company should be located, and Article V prescribed where and when the annual meeting should be held and procedure thereat.

Article VI provided that the capital stock of said consolidated company should be $100,000,000, divided into 1,000,000 shares of $100 each, divided further into 750,000 shares to be "presently issued" and 250,000 shares "issuable hereafter," the 750,000 shares to be further divided into 250,000 shares of preferred stock and 500,000 shares of common stock.

Article VII provided for the distribution of profits, and Article VIII provided "the manner of converting the capital stock of each of said companies into that of the consolidated company," in which, as to the stock of the Florida Central and Peninsular, it is provided:

"2. To the holders of preferred stock of Florida Central & Peninsular Railroad Co. one share of the preferred stock and one share of the common stock of the consolidated company for each share of the preferred stock of said Florida Central & Peninsular Railroad Co.

"To the holders of the common stock of said Florida Central & Peninsular Railroad Co. one share of the common stock of the consolidated company for each share of the common stock of said Florida Central & Peninsular Co.

"But in the exchange of stock, both common and preferred, of the Florida Central & Peninsular Railroad Co. for the common and preferred stock, respectively, of said Seaboard Air Line Railway, no exchange is to be made for the stock of the said Florida Central & Peninsular Railroad Co., either common or preferred, now held and owned by said Seaboard Air Line Railway."

Article IX contained authority for the execution of an indenture of mortgage and Article X was as follows:

"Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it."

Article XI directed that "The president or other proper officer of said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida." The copy in evidence is certified by the secretary of state of the State of Florida as—

"a true copy of articles of agreement and consolidation of Seaboard Air Line Railway and Florida Central & Peninsular Railroad Co., dated June 27, 1903, forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of the States of

Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the 15th day of August, 1903."

The said consolidation was made under authority of the statutes of the State of Georgia, and the statutes of the State of Florida.

The Seaboard Air Line Railway, as created under the terms of said agreement, is the petitioner in this case, and its petition was filed April 18, 1904.

II.

At the times hereinafter stated movements of United States troops, with freight belonging to the United States, and baggage of the troops, occurred over the line of railroad then operated by said Florida Central & Peninsular Railroad Co., all either being wholly over or terminating on the lines of said company, and none of said movements were over the lines of railroad then owned by the plaintiff herein.

III.

All settlements for movements here involved were made by a disbursing quartermaster of the Army, on presentation of the original bills of lading, on the basis of weights shown thereon. In cases where it appeared by notation on the bill of lading that an amount of baggage claimed free was carried in carload lots, such cars did not appear in the voucher among the items of charge on account of the particular bill of lading referred to by number, and no payment therefor was made. In other cases deduction was made from the total weights of certain classes of freights carried, upon the basis of 150 pounds for each officer and enlisted man shown to have been transported.

BRIEF.

For protection against confusion of the issues appellant is compelled to ask the intervention of this court at the threshold of the appeal. The Court of Claims finally, at a second hearing, dismissed the petition on the ground, clearly set forth and discussed in its opinion, that the claimant had no legal capacity to maintain the suit; but it rendered, or rather retained, findings of fact going to the merits of the case as well as to the preliminary question of parties. The opinion suggests that different findings might be made, upon the merits, if the court should proceed to more mature consideration of the case. The court denied claimant's application for a new trial and has refused to exscind the findings made or to omit them from the appeal rec

It is submitted (1) that, if these parts of the findings are both gratuitous and out of harmony with the facts, they should not remain in the record to suggest here that there is no cause of action for any suitor; and (2) that, if they are merely gratuitous, the court will serve its own convenience and the parties' by eliminating them before the record is printed.

All that the Court of Claims in reality decided is that present claimant acquired the claim by an "assignment" which is nullified, in relation to the United States, by Section 3477 of the Revised Statutes; but the conclusion of law and judgment are in those broad terms which would have been employed if there had been an explicit submission of the case on the merits, including every defense whatsoever in bar of the action. Appellant's counsel are not able to take any other view of this judgment, with these findings of the like broad scope, than that it decides in favor of the United States every possible issue in the case. They therefore ask

the court to reduce the record within such bounds that the adjudication will be clear as determining that this appellant has no standing in court—that and nothing more.

The decisions of this court seem very broad to the effect that in its review of a case coming from the Court of Claims the court will consult the findings of fact, conclusion of law and judgment alone. These, the court says, will not be treated as "modified by anything said in the opinion."

Crocker v. *United States*, 240 U. S. 74.
Stone v. *United States*, 164 U. S. 380.
Chapman v. *Bowen*, 207 U. S. 89.
British Queen Mining Co. v. *Baker Silver Mining Co.* 139 U. S. 222.

Surely if, from the present transcript which has come from the Court of Claims, this court should determine that nothing was considered and decided there except a question of the claimant's competence to maintain the suit, the record proper will have been modified by the opinion.

A case having been tried both on jurisdictional grounds and on grounds going to the right of action itself, no separate issues being framed, and the bill having been dismissed: *Held*, that the decree determined all questions in the defendant's favor.

Northwestern Laundry Co. v. *Des Moines*, 239 U. S. 486.
See also *Murray* v. *Pocatello*, 226 U. S. 318.

The Court of Claims, in the new opinion, takes the ground that, having found a reason why the present suitor may not recover a judgment upon any state of facts, the court has no commission to go into the facts, and make findings, reaching the merits of the claim.

But has it not done this interdicted thing, by readopting findings made previously on the merits, as unmistakably as it would have done by proceeding to consider all the facts again and make new findings of the same scope? In other words, would not any new findings on the merits have been void; and if that is true, are not the present findings on the merits void? If so, again, would this court have them included in its printed record on which it will consider the case?

The Findings are Incorrect and Would Do Appellant an Injury.

If confessing that the findings on the merits of the claim are correct—that they do substantial justice to the facts of the case—appellant could hardly venture to ask this court to exscind those findings because they are superfluous. Should this court regard these findings, though superfluous, as speaking correctly on the merits of the claim, there is all too much reason to apprehend it would say that there is no valid cause of action here for any claimant whomsoever, and therefore that an incorrect decision regarding the *locus standi* of the person who has sued is *damnum absque injuria*.

When the court considers the methods, unusual, to say the least, by which the Court of Claims proceeded to its conclusion on the merits of the claim, it will not be surprised that the findings missed the mark. Following are some of those acts, as narrated in the motion.

The court in its deliberations (not by any previous announcement) disregarded a stipulation of fact on which the fifteen preceding cases of other claimants, on the same basis cause of action, had been tried, and which the briefs had treated as a part of this case.

The court disregarded a large volume of other evidence which had been imported into this case, by the court's ordinary procedure, from other cases.

The court presumed in the Government's favor something which it had given the Assistant Attorney General an opportunity, by suspending the hearing, to prove, which finally he confessed he could not prove, and which is not true.

The court, in relation to some of the movements of freight in question chose to ignore the contract itself which fixed the terms of the shipments, and rested its conclusion upon a letter written some days later by an army officer to another army officer, which purported to state those terms.

In fixing its definition of "baggage" the court referred to, and set out in the findings, a proposition made by the railroad companies in 1908, which was not accepted by the Government's officers; but with respect to the compensation which that agreement would have yielded upon the reduced computations of the freights—much more than was paid because special, high *rates* were named—it disregarded that tender. Moreover the findings do not say, as *did* the first opinion, that this tender was subsequent to most of the transactions of this case.

Not unnaturally, this result has followed from proceedings so remarkable:

On proof at least as ample as had ever been made before, the Court of Claims has determined here adversely to the present claimant the same main question which it previously had determined, fifteen times, in favor of other claimants. Similarly the subsidiary issues here presented have been tried over and over again, from four to seven times each, and in every

case but this one the result was favorable to the claimant.

Before or in the process of taking its appeal, three applications were made by appellant to the Court of Claims itself for that change in the findings of fact, or in the record thereof, which is here requested, and each application was overruled.

There is one difference of fact between the present case and the cases previously decided, but that is of such sort as, to say the least, does not plead for the denial to the present claimant of the relief given to the others. As has been said in the motion (paragraph 12) the fact does not occur here that the railroad company rendered its bills upon those identical, diminished weights of freight of which the suit complains. On the other hand, its bills stated the full weights of the freights and claimed compensation for those. (See affidavit of B. B. McCaa filed in support of motion to set judgment aside, Exhibit C herein.)

This motion and brief speak of the final findings of the Court of Claims as a mere repetition of those previously made; and what the court has said at the conclusion of the second opinion so signifies. According to the record, the original findings were withdrawn and new findings filed; but for the present purpose the court's recital in the opinion, and the references herein, are correct. No change whatever was made in those findings which relate to the merits of the claim. The only change made was the insertion of the two last sub-paragraphs in the first finding.

If this motion for diminution of the record does not lie, the reason must be that the findings to which it relates are superfluous and nugatory and will not be considered by this court. But if that be true, some

expense can be saved by the elimination of those findings before the printing is done, and the Government will have suffered no prejudice.

BENJAMIN CARTER,
Attorney for Appellant.

F. CARTER POPE,
Of Counsel.

Notice of this motion, by serving a copy thereof was given to the Assistant Attorney General of the United States having charge of the defense on the 23d day of December, 1918, with notice that the motion will be presented to the court on the 13th day of January, 1919, or so soon thereafter as the court may be sitting to receive it.

BENJAMIN CARTER,
Attorney.